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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 982

J. M. COHAN,

Petitioner,

vs.

CHARLES SAMUEL ELDER and MARY ETHEL ELDER, his wife,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was filed March 26, 1941 (R. 98-103) and is not yet reported in the Federal Reporter. A previous opinion on a former appeal rendered June 7, 1940, is reported in 112 Fed. (2d) 967.

STATUTES INVOLVED

The statute involved in this case is Section 75 of the Bankruptcy Act, as amended, subsections (a) to (s); 11 U. S. C. A. 203 (a) to (s).

STATEMENT OF THE CASE

(Throughout this Statement and Brief Petitioner Cohan and his predecessor in title, Creditor Feldman, will be referred to as petitioner, and the respondents as debtors.)

Petitioner here seeks to have this Court take jurisdiction and reverse the action of the Circuit Court of Appeals of the 9th Circuit. That Court has affirmed the action of the District Court for the Southern District of California in refusing to set aside an adjudication of debtors as bankrupts under subsection (s) of Section 75 of the Bankruptcy Act.

In 1931 debtors purchased a 20 acre citrus grove from petitioner for $52,500.00 (R. 3-4). In the next succeeding six years they paid all obligations against the grove except a note secured by a second trust deed now back in petitioner's hands amounting to $21,147.00 principal and interest (R. 4, 23).

In January, 1937, debtors had arranged refinancing to pay off petitioner's note (R. 5), when a freeze occurred destroying the entire crop of lemons on 17 acres of this grove (R. 5). Petitioner then took steps to foreclose (R. 10).

A proceeding for moratorium relief in the State Court was dismissed on a technical jurisdictional point without passing on the merits (R. 20). Thereupon two companion petitions were filed for relief under Section 75 in the District Court on July 13, 1937 (R. 18, 21).

A second amended extension proposal was approved by a majority in number and amount of debtors' creditors on September 30, 1937 (R. 21) and confirmation recommended to the District Court (R. 22). On November 15, 1937, Hon. Harry A. Hollzer, District Judge, heard the application for confirmation (R. 20). The proposal was confirmed by the Court on May 24, 1938 (R. 24).

In September, 1939, following extensive hearings in April and May, 1939, Judge Hollzer denied petitioner's application to dismiss, and modified the plan by postponing certain principal payments and reducing interest to all creditors to 3½% (R. 45). On appeal this action was affirmed by the Circuit Court of Appeals on June 7, 1940, 112 Fed. (2d) 967.

On July 2, 1940, petitioner filed motions for leave to sell (R. 66) and to vacate restraining orders (R. 48). Debtors' applications for leave to amend and be declared bankrupts under subsection (s) were filed July 5, 1940, (R. 52, 56) accompanied by the recommendations of the Conciliation Commissioner that such adjudications be made (R. 54, 58). Adjudications were entered that same day (R. 60, 61). On July 11, 1940, petitioner moved to set aside these ajudications (R. 70). That motion was heard July 15, 1940, (R. 75), and denied August 6, 1940 (R. 78). The appeal to the Circuit Court of Appeals followed.

On page 8 of the petition reference is made to the fact that at the hearing on July 15, 1940, petitioner "was

permitted (R. 77) to present the testimony of two appraisers out of order for the purpose of saving this creditor additional appearance fees." After naming these appraisers, petitioner goes on to assert that they "each testified that the value of the lemon grove * * * was under $20,000.00, same being under our lien amount." The record (R. 77) does not even disclose that these two witnesses were appraisers and gives us no indication as to what their testimony was. Since counsel have gone outside the record on this point, we think it fair to state that following the appeal to the Circuit Court of Appeals, Conciliation Commissioner C. P. Von Herzen proceeded to have an appraisal made of the lemon grove and of the other assets of the bankrupts as a part of the regular procedure under subsection (s), and that such appraisal, filed December 5, 1940, fixed the value of the lemon grove at $31,000.00.

Also on page 8 of the petition counsel asserts "all of the record presented in the District Court on the matter is now before the Court." We consider this assertion very misleading. While no parole evidence was offered by either side, we, as counsel for debtors, did present in detail facts which were accepted by the trial court as true, establishing that the position of the farmer-debtors had been materially improved. One such fact was that Mr. T. B. Freeland, a creditor named in the schedules and an uncle of Charles Elder, one of the debtors, had died in May, 1940, leaving a will under which debtors' two notes and all interest thereon, amounting to more than $9,000.00, were forgiven and

cancelled. The second fact so disclosed to the trial court was that the father of Mrs. Elder, D. C. Crookshank, had died in the same month of May, 1940, and that upon her father's death Mrs. Elder became the life beneficiary under a trust of 50 acres of unmortgaged citrus property. These facts were deemed material as to the debtors' ability to rehabilitate themselves during the stay of proceedings under subsection (s).

The record on this appeal and the record on the earlier appeal between the same parties, establish that from the time of the big freeze in January, 1937, petitioner and his predecessor in title have constantly made every move they could to harrass these debtors and to prevent the orderly procedure under Section 75 of the Bankruptcy Act.

ARGUMENT

I

SUBSECTION (s) OF SECTION 75 OF THE BANKRUPTCY ACT GRANTS TO EVERY FARMER-DEBTOR THE RIGHT TO AMEND HIS PETITION ASKING TO BE ADJUDGED A BANKRUPT IF HE FEELS AGGRIEVED BY ANY EXTENSION PLAN, AND THERE IS NO LIMITATION REQUIRING THIS TO BE DONE BEFORE THE PLAN IS CONFIRMED.

The language of subsection (s) is very broad. The portion here to be considered by the Court reads:

> "Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors

whose claims are affected by a composition and/or extension proposal, *or if he feels aggrieved by the composition and/or extension, may amend his petition* or answer, *asking to be adjudged a bankrupt.*" (emphasis ours)

As pointed out by Mr. Justice Healy in the opinion of the Circuit Court of Appeals, the above quoted language of the Statute extends to these debtors as of right the relief given them by the District Court.

Petitioner argues that once a farmer-debtor has secured the approval of a majority in number and amount of his creditors to a plan proposed by him, and such plan has been confirmed by the Court, he cannot thereafter claim to be aggrieved under the language above quoted from subsection (s).

The Statute, however, does not say that; in fact, it says the very opposite. It clearly contemplates that a debtor may be aggrieved by a plan and there are no limitations of any kind on when he can file such an amended petition.

Counsel for petitioner argues (page 20 of the petition for certiorari) that the relief can be afforded only if the farmer "fails to secure an agreement with his creditors" or "if he feels aggrieved by a plan acceptable to creditors *but which has not as yet been confirmed.*" (Emphasis ours) The italicized portion has no foundation in the language of the Statute itself.

Counsel quotes from the language of Mr. Chief Justice Hughes in the case of *Bartels* v. *John Hancock*

Insurance Co., 304 U. S. 180 at 184 where this Court said:

> "The plain purpose of Section 75 was to afford relief to such debtors who found themselves in economic distress however severe, by giving them the chance to seek an agreement with their creditors (subsections [a] to [r]) and, failing this, to ask for the other relief afforded by subsection (s)."

Petitioner insists that this Court in the above language interpreted the Act in such a manner as to warrant the conclusion that once there is a confirmation there cannot be an amendment under subsection (s). It will be noted that confirmation was not mentioned in the language of this Court. It is further apparent that the Court was talking about the two ordinary alternatives which arise, namely, an agreement under (a) to (r), or, failing such an agreement, relief under subsection (s). This Court did not there have before it any necessity of construing the language as to a farmer-debtor feeling "aggrieved by the composition and/or extension." To interpret the language of this Court in the *Bartels Case* as covering every possible contingency, would render that portion of subsection (s) relating to a farmer feeling aggrieved by a plan absolutely meaningless. We respectfully submit that Mr. Justice Healy is correct in referring to the *Bartels Case* as sustaining the result reached in this case by the District Court.

Let us apply to the present case counsel's test that confirmation of a plan is the act which cuts off the

rights of a farmer-debtor to seek relief under (s). The plan was dated September 27, 1937, (R. 21) but it was not confirmed by Judge Hollzer until May 24, 1938. (R. 24). This would mean that on May 23, 1938, debtors could properly ask to go under (s) but that on May 25, 1938 they could not. This would seem to be a wholly unreasonable result.

We join counsel for petitioner in their statement (petitioner's Brief p. 21) that there is no reported case directly covering this point. However, there is a decision by Hon. Leon Yankwich, District Judge, rendered in this Southern District of California, Central Division, in a case entitled: *In the Matter of James Perry Glass,* No. 4096 of the files in the District Court. That case was referred to by us in briefs filed with the District Court and with the Circuit Court of Appeals.

Those court files and records show that James Perry Glass, a resident of Fresno County, California, filed his petition under Section 75 on November 6, 1935. His petition was ordered approved on the same day and a reference made to Conciliation Commissioner Walls. On April 13, 1936, a petition for composition and extension was filed and on August 6, 1936, Judge Stephens entered an order to show cause why this petition should not be confirmed. On August 12, 1936, the plan was approved and confirmed.

On January 31, 1939, Mr. Glass petitioned to be adjudicated a bankrupt under subsection (s). In his petition he alleged, among other things, "that petitioner

feels aggrieved and is aggrieved by the composition and extension agreement made and entered into between petitioner and his creditors." On February 25, 1939, John Preston King, Conciliation Commissioner, filed his report recommending adjudication under subsection (s). On February 27, 1939, an order was entered by the late Hon. William P. James, of the District Court, adjudicating Glass a bankrupt under subsection (s).

On April 18, 1939, an eight-page petition to set aside the adjudication under (s) was filed by one of the creditors, and a notice of such petition and an affidavit of mailing. On May 3, 1939, the moving creditor, by leave of Court, filed points and authorities.

On May 4, 1939, the farmer-debtor, Glass, filed his affidavit supporting the adjudication under (s) *in which he asserted that the creditor in question had done everything in his power to oppose and defeat the plan.* (Emphasis ours).

On May 5, 1939, Judge Yankwich entered a minute order denying the petition to set aside the order of adjudicating under (s) and that adjudication continued to stand.

Here, then, was a plan similar to the one now before the Court which had been advanced by the farmer, approved by a majority of creditors and confirmed by the Court. Moreover, on January 31, 1939, when Mr. Glass filed his amended petition to go under (s), his plan had

less than 2½ months still to run because it had been dated and filed April 13, 1936.

This decision of Judge Yankwich as to a case practically identical with our own, is highly persuasive. More important to us, however, is the fact that it was binding on Conciliation Commissioner Von Herzen and was considered by him to be controlling when he recommended an adjudication to go under (s) in the present case. In the light of these facts we submit that the charges contained at page 28 of Petitioner's Brief that the Commissioner acted fraudulently are entirely unjustified and not borne out by the record. Similar charges were made in the two courts below and were disregarded as untrue. It is to be regretted that a Conciliation Commissioner should be subject to such an unwarranted attack.

Petitioner quotes from Representative Lemke, cosponsor of the bill, that the maximum time given the farmer-debtor to pay his debts is three years (Petitioner's Brief p. 22). There can be no dispute that the protection of subsection (s) does grant a three year stay, but to argue from that that the benefits of the Act were limited to three years is absurd.

Negotiations toward the agreement of creditors and debtor as to a plan often take as long as a year before either an agreement is reached, or, on a failure to agree, a petition to go under (s). If there is an agreement there is no limitation whatever on the time that such an

agreement can cover; it may be six months; it may be three years; it may be five years or longer.

A relevant example is found in the case of *Borchard* v. *California Bank,* 310 U. S. 311, decided by this Court May 20, 1940. Borchard filed his original petition under subsection (s) in May, 1935. In June, 1935, the case was dismissed and reinstated in September, 1935, after the 1935 amendment. In October, 1935, Borchard asked for an appraisal. Shortly thereafter the creditor bank asked to have the proceeding dismissed. This motion was denied. Stipulations were thereafter entered into whereby the proceeds of the crops were expended for the cultivation and improving of the land. On May 24, 1938, debtors again asked for appraisal and an appraisal was made. On November 10, 1938, the bank moved to dismiss the case. The trial court granted the dismissal which was affirmed by the Circuit Court of Appeals but reversed by this court.

The effect of this Court's decision was to give an additional stay of three years, which made eight and a half years after the filing of Borchard's original petition to go under (s) and seven and a half years after the reinstatement of that application.

We agree with counsel for petitioner that "where the language of a Statute is plain and unambiguous, it is the duty of the Court to enforce it according to its obvious meaning (Petitioner's Brief p. 21). We disagree, however, with counsel's conclusions in that we

believe the plain and unambiguous language of Section 75, here under consideration, permitted the debtors to be adjudicated under subsection (s).

Even if there were any ambiguities in that portion of subsection (s), here under consideration, such ambiguities must be resolved in favor of the debtors and the act liberally construed to give the debtors the full measure of relief afforded by Congress. *Wright* v. *Union Central Life Insurance Co.,* 85 L. Ed. 166.

Counsel for petitioner relies on the recent case of *Wright* v. *Logan,* No. 7368, Circuit Court of Appeals (7th Cir.) decided March 15, 1941 (Com. Cl. House, Par. 53,087, Page 53,155); (Petition for Certiorari, P. 24). That case involved a situation where foreclosure had already taken place and is to be distinguished from the present case on that ground. To the extent, if any, that it can be said to be applicable here, we think it is in direct conflict with this Court's holding in *Borchard* v. *California Bank,* 310 U. S. 311, supra.

Petitioner urges (Petition P. 25) that the prohibition against granting a discharge, contained in 11, U. S. C. A. Sec. 32, subsection c. (5) operates to prevent the farmer resorting to subsection (s) after the composition or extension plan has been confirmed. Paragraph 5 of subsection (s) of Section 75 of the Act provides that "previous discharge of the debtor under any other section of this title shall not be ground for denying him the benefits of this section." The fact that Section 32, subdivision c. (5) was enacted in 1938 as a

part of the Chandler Act, cannot be held to repeal by implication the above quoted proviso in paragraph 5 of subsection s, particularly in view of the provision elsewhere in Section 75 that the general bankruptcy act shall apply to farmer-debtor cases unless otherwise specifically provided for in Section 75 itself.

II

THERE IS NO LIMITATION AS TO THE TIME WITHIN WHICH THE FARMER-DEBTOR MAY FEEL AGGRIEVED AND SEEK ADDITIONAL RELIEF UNDER SUBSECTION (s).

We have pointed out that there are no words of limitation as to when a debtor may consider himself aggrieved by a plan and file an amended petition under (s).

Opposing counsel contends that the words "within a reasonable time" must be read into the Act, thus requiring that the amended petition must be filed within a reasonable time after the plan has been confirmed. The Statute says nothing about a reasonable time. As we pointed out under point I, supra, the Act is to be construed liberally to accord the farmer-debtor the full measure of relief afforded by Congress, *Wright* v. *Union Central Life Insurance Company,* 85 L. Ed. 160. As pointed out by Mr. Justice Healy of the Circuit Court, the situation impelling the farmer-debtor to seek adjudication under subsection (s) may not develop until the plan has been in effect for a substantial time. Such was the case here and such was the case in the

Glass Case, fully described under point I, supra, where a similar result was reached in the same Federal District Court.

Counsel again refers to the case of *Wright* v. *Logan,* Circuit Court of Appeals (7th Circuit) No. 7368, (Com. Cl. House, paragraph 53,087, p. 53,155). It is true that Mr. Justice Sparks, in the opinion in that case, said:

> "Subsection (s) provides that any farmer failing to obtain the acceptance of a majority of his creditors may amend his petition or answer asking to be adjudged a bankrupt. No time is specified within which such application is to be made, but we have construed the Statute to provide that a reasonable time is to be allowed to enable the debtor to affect a composition with his creditors, or, failing that, to apply to the Court for adjudication in bankruptcy."

In that case there had never been any plan approved by creditors or confirmed by the Court and so, strictly speaking, it is not here applicable. Moreover the decision of the Court in the Logan case might be justified as an alleged failure to comply with General Order in Bankruptcy, No. 50, sub. 4, requiring a debtor under (a) to (r) to make application for confirmation within 90 days or suffer a dismissal of his petition.

On pages 27 and 28 of Petitioner's Brief, counsel attempt to establish that the alleged facts recited in the Commissioner's certificates and recommendations of adjudication under (s) were either knowingly false or made so recklessly as to warrant a finding that the Commissioner acted fraudulently.

For the purpose of this Court's consideration of the pending application for certiorari, we respectfully submit that the certificates and recommendations of the Conciliation Commissioner stand as an adjudication of the facts stated in said reports.

As to debtor, Charles Elder, the Commissioner in his report, after stating the jurisdictional facts as to the original filing of the petition, the acceptance and approval of the extension proposal and its later amendment, continued:

> "It further appearing that said debtor has substantially carried out his commitments under said plan, as amended, and that said debtor has now stated under oath that he feels himself aggrieved by said composition and extension as so amended, and
>
> "It further appearing to said Commissioner that under said stated facts said debtor is entitled to file an amended petition under Section 75, subsection (s) of the Bankruptcy Act:
>
> " * * * said Commissioner further recommends that Charles Samuel Elder, debtor herein, be adjudged bankrupt pursuant to provision of subsection (s) of Section 75 of the Bankruptcy Act, as amended" (R. 55).

As against these direct findings of fact, all that there is in the record supporting petitioner's position are allegations on information and belief on the part of petitioner and his attorney, John P. Tobin, that the debtors are unable to pay their current obligations (R. 73, 68, 50, 67, 61).

The direct findings of fact by the Commissioner that the debtors have substantially carried out their commitments under the plan, cannot be overcome by affidavits upon information and belief.

The provisions of Federal Rule 52 (a) seem to apply to this situation. It is provided that

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of the Master, to the extent that the court adopts them, shall be considered as findings of the court."

The assertions on information and belief in the several affidavits cannot overcome the findings of Commissioner Von Herzen, who in this matter has authority equivalent to or greater than that of an ordinary master. This is particulary true since the allegations in the affidavits are incomplete and inconclusive with no showing whatever as to expected receipts of income from the two groves of the farmer-debtors during the near future and as to other pertinent facts within the Commissioner's knowledge at the time he made the findings.

Counsel asserts (Petition and Brief P. 8, 27) that the facts alleged in the petitioner's affidavits were never denied by the debtors or the Conciliation Commissioner.

The Conciliation Commissioner was not on trial. Furthermore, he was in court in response to a sub-

poena as a witness for petitioner (R. 72). Although there in response to such subpoena, he was not asked to testify.

Upon this record we respectfully submit that it is this Court's duty to accept the Commissioner's findings as true, especially where those facts have in effect been adopted by the District Court and the Circuit Court of Appeals in their refusal to set aside the adjudication under (s) made by Judge Cosgrove.

We need hardly emphasize how detrimental to the orderly working of the plan approved by the District Court was the constant litigation and uncertainty resulting from the attitude of petitioner and his predecessor in title throughout the period from September, 1937, to July, 1940. The time and energy which had to be spent by the farmer-debtor and by ourselves, as their counsel, in meeting the almost constant and long, drawn out attacks, as shown by this record, made by petitioner, might, under other circumstances, have been spent in obtaining some refinancing which would have paid off petitioner's obligation.

This constant litigation carried on by this one objecting creditor made refinancing practically impossible to obtain. At least one large creditor, who had talked of such refinancing, was so antagonized by being subpoenaed as a witness by petitioner and criticized for having granted orally an extension of time on a small principal payment that he declined to consider further making such a loan.

The plan called for payments of attorneys' fees to ourselves as attorneys for the farmer-debtors (R. 13), but we have never, up to now, asked the Court for the setting aside of any payments to us in spite of the tremendous amount of time spent in meeting and defeating these constant attacks through a more than three year period. Naturally, we expect to be paid for those services but we have been endeavoring in every way to assist in the debtors' financial rehabilitation first.

We respectfully submit that this Court should deny petitioner's application for certiorari and permit the adjudication under (s) to stand and to proceed in an orderly fashion. The appraisal of the property has been made and proper steps will be taken by the Conciliation Commissioner adequately to protect petitioner's lien.

Respectfully submitted,

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